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MAILED
APR 07 2011
OFFICE OF PETITIONS

In re Patent No. 6,017,912
Issue Date: January 25, 2000 :
Application No. 09/031,862 : DECISION ON PETITION
Filed: February 27, 1998 :
Patentee: Letantia Bussell :

This is a decision on the petition under 37 CFR 1.378(b), filed February 11, 2011, to accept the unavoidably delayed payment of the maintenance fee for the above-identified patent.

The petition under 37 CFR 1.378(b) is **DISMISSED**.

The above-identified patent issued January 25, 2000. Accordingly, the second maintenance fee could have been paid during the period from January 26, 2007 through June 25, 2007 without surcharge, or with a late payment surcharge during the period from June 26, 2007 through January 25, 2008. No maintenance fee having been received; the patent expired on January 26, 2008.

Petitioner asserts that the entire period of delay from January 26, 2008 to the filing of the instant petition on February 11, 2011 was unavoidable. Specifically, petitioner states that she was never made aware that the patent was nearing expiration. In addition, petitioner explains that she received a notice of patent expiration in March of 2008, but failed to renew the patent due to administrative staff turnover.

37 CFR 1.378(b) provides that:

Any petition to accept an unavoidably delayed payment of a maintenance fee must include:

- (1) The required maintenance fee set forth in 37 CFR 1.20(e) through (g);
- (2) The surcharge set forth in 37 CFR 1.20(i)(1); and
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

The instant petition does not meet requirements (1) and (3) above.

With regard to requirement (1), petitioner has not submitted the full amount of the second, eight-year maintenance fee. Rather, petitioner only submitted \$490, which is the amount of the first, four-year maintenance fee. The eight-year maintenance fee is currently \$1,240.

With regard to requirement (3), acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 USC 133. **This is a very stringent standard.** Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith, 671 F.2d at 538, 213 U.S.P.Q. at 982. Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32.

While the delay in payment of the maintenance fee may have been unintentional, petitioner has failed to provide an adequate showing that the delay was unavoidable. Petitioner has not demonstrated that she had taken reasonable care to pay the maintenance fee. Petitioner has not enumerated the steps she had in place to ensure timely payment of the maintenance fee.

Delay resulting from petitioner's lack of receipt of any maintenance fee reminder(s), or petitioner's being unaware of the need for maintenance fee payments, does not constitute "unavoidable" delay.¹ Under the statutes and regulations, the Office has no duty to notify patentee of the requirement to pay maintenance fees or to notify patentee when the maintenance fee is due. While the Office mails maintenance fee reminders strictly as a courtesy, it is **solely the responsibility of the patentee to ensure that the maintenance fee is timely paid to prevent expiration of the patent.** The failure to receive the reminder does not relieve the patentee of the obligation to timely pay the maintenance fee, nor will it constitute unavoidable delay if the patentee seeks reinstatement under the regulation.² Moreover, a patentee who is required by 35 USC 41(c)(1) to pay a maintenance fee is not entitled to any notice beyond that provided by publication of the statute.³

Furthermore, the Letters Patent contains a Maintenance Fee Notice that warns that the patent may be subject to maintenance fees if the application was filed on or after December 12, 1980. While the record is unclear if petitioner ever read the Notice, petitioner's failure to read the Notice does not vitiate the Notice, nor does the delay resulting from such failure to read the Notice establish unavoidable delay.⁴ The mere publication of the statute was sufficient notice to petitioner.⁵

¹ See In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)), aff'd, Rydeen v. Quigg, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), aff'd, 937 F.2d 623 (Fed. Cir. 1991)(table), cert. denied, 502 U.S. 1075 (1992). See also "Final Rules for Patent Maintenance Fees," 49 Fed. Reg. 34716, 34722-23 (Aug. 31, 1984), reprinted in 1046 Off. Gaz. Pat. Office 28, 34 (September 25, 1984).

² Rydeen, 748 F. Supp. at 905.

³ Id. at 906.

⁴ See Ray v. Lehman, 55 F. 3d 606, 610, 34 USPQ2d 1786, 1789 (Fed. Cir. 1995).

⁵ Rydeen at 906.

Conclusion:

Any request for reconsideration of this decision must be filed within **TWO MONTHS** of the mailing date of this decision.

Any such petition for reconsideration **must be accompanied by the \$400** petition fee set forth in § 1.17(f), in addition to the balance of the second maintenance fee due. After decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Commissioner.

Accordingly, on request for reconsideration, it is extremely important that petitioner supply any and all relevant information and documentation in order to meet his burden of showing unavoidable delay. This includes statements by all persons with direct knowledge of the cause of the delay, setting forth the facts as they know them.

If on request for reconsideration, the delayed payment of the maintenance fee is not accepted, then the \$1240 maintenance fee and the \$700 surcharge set forth in §1.20(i) are subject to refund following the decision on the petition for reconsideration, or after the expiration of the time for filing such a petition for reconsideration, if none is filed.

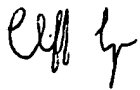
(Petitioner may request a refund of the maintenance fee and surcharge by writing to the Mail Stop 16, Director of the USPTO, P.O. Box 1450, Alexandria VA 22313-1450). A copy of the last decision rendered should accompany the request for refund).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (571)273-8300
 Attn: Office of Petitions

Telephone inquiries specific to this decision may be directed to the undersigned at (571)272-3207.



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